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JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 407.

DAN ROGERS, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

BRIEF FOR PLAINTIFF IN ERROR.

WILFORD H. SMITH,
Attorney for Plaintiff in Error.

(19,058.)

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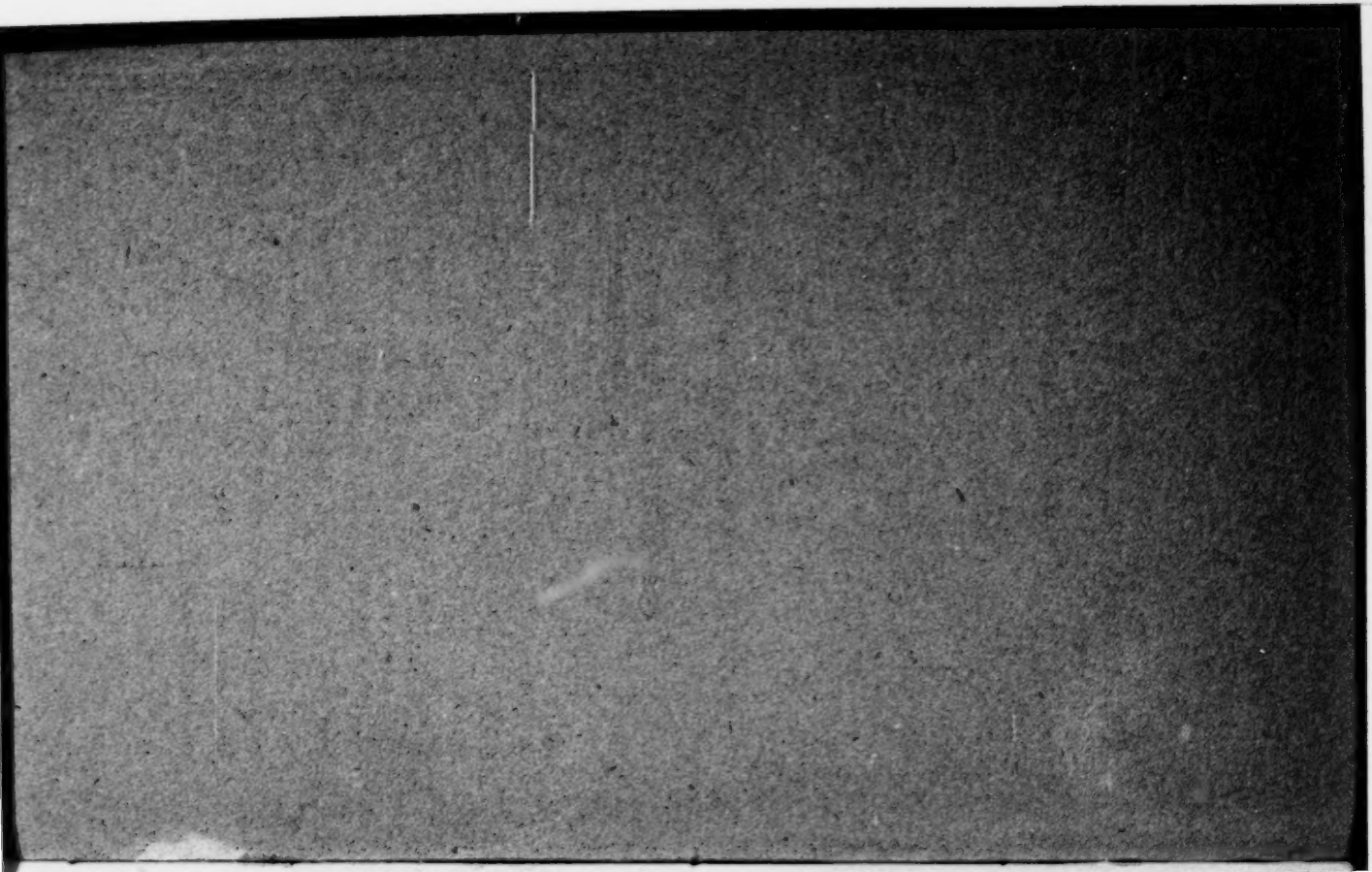

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 407.

DAN ROGERS, PLAINTIFF IN ERROR,

against

THE STATE OF ALABAMA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error was indicted at the July term, 1902, of the city court of Montgomery for the crime of murder and at the October term, 1902, was tried and convicted. At the trial he moved to quash the indictment and the panel of petit jurors on the ground that he had been denied the equal protection of the law in the empanelment of said grand and petit jurors, and that his race had been disfranchised and denied the right to qualify as electors on account of their race and color and previous condition by the State of Alabama under and by virtue of the suffrage provisions of its constitution of 1901, which had the effect to exclude all negroes from the panel of grand and petit juries in the county of Montgomery.

The trial court struck the motion to quash the indictment from the files on the motion of the solicitor for the State, and refused to hear any evidence in support of the same; to which the plaintiff in error excepted.

Record, p. 13.

The motion to quash the panel of petit jurors was overruled, and the court likewise refused to allow the introduction of proof in support of the same; to which the plaintiff in error excepted.

Record, p. 16.

An appeal was taken from the judgment of the city court of Montgomery to the supreme court of Alabama, where the judgment of the city court was affirmed. The only errors presented to the supreme court of Alabama were the exceptions taken to the action of the trial court on the motions to quash the indictment and the panel of petit jurors, so that nothing but a Federal question was before the State supreme court for decision. Plaintiff in error points out the following errors in the judgment of the supreme court of Alabama upon which he relies for reversal in this court, to wit:

SPECIFICATION OF ERRORS.

I.

Because the supreme court of the State of Alabama erred in refusing to reverse the judgment of the trial court because of the error in the trial court in striking from the files the motion of the plaintiff in error to quash the indictment and refusing to permit the defendant's attorney to introduce

any evidence in support of the same, the said motion being made on the ground that the plaintiff in error had been denied the equal protection of the law by the State of Alabama guaranteed by the first section of the fourteenth amendment to the Constitution of the United States, and on the further ground that the plaintiff in error and his race were the victims of race prejudice and proscription, and had been denied the right to vote by the State of Alabama, previously enjoyed by them, for no other reason than their race and color, contrary to the fifteenth amendment to the Constitution of the United States, and that said denial of equal rights and proscription and disfranchisement aforesaid operated to prevent any persons of color from being selected on said grand jury because of their race and color and disfranchisement aforesaid, and that said grand jury was composed exclusively of white men.

II.

Because the supreme court of the State of Alabama erred in refusing to reverse the judgment of the trial court because of the error in the trial court in overruling the several motions of the plaintiff in error to quash the panel of petit jurors selected to try the plaintiff in error, and refusing to allow the introduction of any evidence in support of the same, the said motions being made on the ground that the plaintiff in error had been denied the equal protection of the law by the State of Alabama guaranteed by the first section of the fourteenth amendment to the Constitution of the United States, and on the further ground that the plaintiff in error and his race were the victims of race prejudice and proscription, and had been denied the right to vote by the State

of Alabama, previously enjoyed by them, for no other reason than their race and color, contrary to the fifteenth amendment to the Constitution of the United States, and that said denial of equal rights and proscription and disfranchisement aforesaid operated to prevent any persons of color from being selected on said petit jury because of their race and color and disfranchisement aforesaid, and that said petit jury was composed exclusively of white men.

III.

Because the supreme court of the State of Alabama erred in not reversing the judgment of the trial court because of the error in the trial court of compelling the plaintiff in error to accept the trial jurors tendered to him by the solicitor for the State after he had moved to quash the panel of said petit jurors on the grounds stated in his motions.

ARGUMENT.

The attempt on the part of the supreme court of Alabama to place its decision on the ground of State practice, in order to avoid the Federal question, is utterly futile.

Opinion of Ala. Supreme Court, Record, pages 19, 20, and 21.

There was nothing before that court but the Federal question the decision of which was essential to the determination of the case, and we contend that the judgment rendered was a decision of the Federal question and gives this court the right to review. The jurisdiction of this court, there-

fore, to review the decision of the Alabama supreme court being clear, the next question is: Was the decision of that court in accordance with the law? In support of our contention that the decision of that learned tribunal was erroneous and should be reversed, we submit the following POINTS OF ARGUMENT:

I.

The motion to quash the indictment, calling the attention of the court to the denial of rights claimed under the Federal Constitution, should not have been struck from the files without giving the plaintiff in error an opportunity to prove the allegations therein contained; and the action of the trial court in this particular, and its refusal to permit the introduction of any evidence in support of said motion, was such an error as called for a reversal by the supreme court of Alabama (Record, pp. 11, 12, and 13).

Carter against Texas, 177 U. S., 442.

The supreme court of Alabama admitted that the allegations of race discrimination against negroes as jurors was sufficient to sustain the motion and required a different ruling had it stood alone and had not been joined with the allegation of discrimination in the matter of registration, which, it was alleged, operated and had the effect of excluding them from jury service on account of race and color.

We submit that the allegation of the denial of rights under the fifteenth amendment strengthened rather than weakened the motion to quash the indictment, and required investigation by the trial court.

The Alabama supreme court was in error in holding that because the statutes of Alabama do not require that jurors shall be qualified electors that the second ground of the motion to quash was unavailing.

Record, p. 20.

We contend that it is utterly immaterial what the letter of the law is in this regard, if in fact and in truth those charged with its administration so enforced the law, it was the same as if it had been written in the statutes.

Yick Wo *vs.* Hopkins, 118 U. S., 356.

II.

The motion to quash the indictment was not prolix, but contained essential averments in the presentation of the rights claimed by the plaintiff in error under the Federal Constitution. Anyhow, this court will not be controlled by the decision of the State court as to what form of language shall be used in pleading rights claimed under the Federal Constitution.

III.

The action of the trial court in overruling the several motions of the plaintiff in error to quash the panel of petit jurors and refusing to allow the introduction of any evidence in support of the same was such an error as called for reversal in the supreme court of Alabama.

Carter *vs.* Texas, 177 U. S., 442.

Neal *vs.* Delaware, 103 U. S., 370.

Gibson *vs.* Mississippi, 162 U. S., 565.

Admitting for the sake of the argument that a motion to quash the panel of petit jurors on the ground of the denial of rights claimed under the Federal Constitution stands on the same footing with a motion to quash the venire for some trivial irregularity in its drawing, service, or return, still the motion in this case did not come too late, because it was made before the trial began, and (as the bill of exceptions states it) "when the first juror was called and sworn to answer questions as to his qualifications, prior to his empanelment to serve as a juror, after said juror had been accepted by the solicitor for the State and tendered the defendant" (Record, p. 13).

Peters against The State, 100 Ala., 12.
Ryan *vs.* The State, 100 Ala., 108.
Thomas *vs.* The State, 94 Alabama, 75.

IV.

We submit that a motion to quash the panel of petit jurors on the ground of the denial of rights claimed under the Federal Constitution stands on higher and different grounds from a motion to quash the venire for matters of form or irregularity contemplated in the Alabama decisions, and that the motion in this case did not come too late.

Shall the constitutional rights of our citizens be sacrificed to mere State forms, or shall the State practice be made to conform to the protection of great constitutional guarantees?

V.

The motion to quash the panel of petit jurors on the ground of the violation of the rights of the plaintiff in error under the fourteenth and fifteenth amendments to the Federal Constitution should have been sustained by the trial court, and, because of its failure to do so, its decision should have been reversed by the supreme court of Alabama.

The bill of exceptions shows that the plaintiff in error offered to introduce the testimony of David Johnson, clerk of the circuit court of Montgomery county, who would have sworn that he was secretary of the jury commissioners of Montgomery county, and as such selected the petit jurors for the October term, 1902, of the city court, who tried the defendant, and that said jurors were selected from the registration lists, and that no negroes were selected by him.

The bill of exceptions further shows that the testimony of H. H. Matthews, clerk of the city court, was offered, who would have testified that he had been ten years clerk of said court, and that during that time no negroes were drawn on any jury in that court, that the negroes are in the majority in Montgomery county, many of whom are qualified for jury service.

That the testimony of Jackson W. Giles was offered showing that, out of five thousand qualified electors of the negro race in Montgomery county, only forty-seven were on the registration lists because they had been excluded from the lists and refused registration under the suffrage provisions of the constitution of 1901, on account of their race and color, while all white men applying for registration were

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admitted and entered on such lists; and that, although qualified for jury service, all negroes were excluded from such service on account of their race and color and because not qualified electors enrolled on the registration lists.

Carter *vs.* Texas, 177 U. S., 442.
Williams *vs.* Mississippi, 170 U. S., 213.
Yick Wo *vs.* Hopkins, 118 U. S., 356.

Unquestionably, the record in this case shows a manifest denial of rights under the Federal Constitution by the authorities of the State of Alabama, in the face of recent decisions of this court, which calls for a reversal.

WILFORD H. SMITH,
Attorney for Plaintiff in Error.

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Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 337.

JACKSON W. GILES, PLAINTIFF IN ERROR, against CHAS. B. TEASLEY, ET AL., Board of Registrars of Montgomery County, Alabama.	Suit for Damages.

No. 338.

JACKSON W. GILES, PLAINTIFF IN ERROR, against CHAS. B. TEASLEY, ET AL., Board of Registrars of Montgomery County, Alabama.	Application for Mandamus

No. 407.

DAN ROGERS, PLAINTIFF IN ERROR, vs. THE STATE OF ALABAMA.	Murder Case.

MOTION TO CONSOLIDATE AND ADVANCE.

Objections by defendants in error, in above causes, numbered 337 and 338, to the motion made to consolidate and advance them for hearing with cause number 407, by W. A. Gunter, attorney for defendants in error in said causes 337 and 338.

The defendants in error in said causes 337 and 338 respectfully object to the granting of the motion to advance said causes and consolidate them with the criminal case numbered 407 for the following reasons:

1. The said causes 337 and 338, are wholly dissimilar to cause 407, the first being civil causes involving private rights between individuals, and the latter being a criminal cause between the State of Alabama and the defendant therein, who was indicted and convicted of murder.

The principle of consolidation is impossible of operation when the parties are different and the causes of action are different and the questions different. Here the causes are wholly distinct in every feature. The judgment in case number 407 was one of conviction at the instance of the State of the plaintiff in error of a murder; in number 337, the judgment sought was damages in favor of the plaintiff in error in that suit, for alleged wrongful official action of the defendants in error in that case; while in the third case, number 338, a mandamus is sought by the plaintiff in error to compel official action by the defendants in error in that case.

It is evident that these multifarious cases, distinct as to parties and the nature of the proceeding, do not fall within the rule of Revised Statutes sec. 921, nor of the rule of the English practice as to consolidation.

Mutual Life Ins. Co. v. Hillmon, 145 U. S., 285.

2. By reference to the decision of the State Court in cases number 337 and 338 shown in 33 So. Rep., 819-20, as well as in the Records on file, it will be seen that no federal question was actually decided. If the cases were disposed of below without passing on such a question, nothing short of a trial of these cases can determine whether or not such a question will be decided in this court, for it is clear that if the judgment of the lower court may rest, and was decided on a non-federal question, the judgment will not be disturbed.

New Orleans v. N. O. Water Works Co,, 142 U. S., 84.

It cannot, therefore, be said that all or any of these cases present *the* same question for consideration, although it may be possible that the same question might with others, be presented in each case.

3. The questions presented cannot be said to be of public interest requiring advancement of the causes on the trial docket. We know of no public interest that will be served by an early judgment in causes number 337-8, and if there is any, in a speedy trial of the criminal cause number 407, it does not apply to the civil cause number 337-8.

The defendants in error in the latter causes, therefore, respectfully object to any association of their cases with 407, as well as to any advancement on the docket.

W. A. Gunby

Attorney for Appellees,
In cases No. 337 and 338.